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No. 83-773

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the Self-Incrimination Clause of the Fifth Amendment require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier admission from the defendant without advising him of his rights, even though the trial court found that the earlier admission was otherwise voluntary, and that it did not "taint" the subsequent confession?

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II. There are sound justifications, provided by doctrinal developments since *United States v. Bayer*, to extend the "fruit of the poisonous tree" analysis to confessions that follow statements which are inadmissible under *Miranda*. Through a principled application of the derivative evidence doctrine, however, the conclusion should be that *Miranda* warnings and a valid waiver adequately attenuate the initial illegality unless the extreme circumstances of a particular case require suppression as a deterrent to future unlawful conduct. 25

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant Elstad's burglary conviction (Petition for Certiorari, Appendix A) is reported at 61 Or. App. 673, 658 P.2d 552 (1983). The order of the Supreme Court of the State of Oregon denying the State's petition for discretionary review of the decision of the court of appeals (Petition for Certiorari, Appendix B) is reported at 295 Or. 617, 670 P.2d 1033 (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The opinion of the Oregon Court of Appeals was entered on February 16, 1983. The Supreme Court of Oregon denied a timely petition for discretionary review on September 7, 1983. The State's petition for writ of certiorari was filed on November 7, 1983, within the 60-day period prescribed by Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V provides in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

United States Constitution, Amendment XIV provides in pertinent part:

"Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Summary of Facts

On the afternoon of December 17, 1981, police officers Burke and McAllister went to the residence of defendant Elstad's parents with a warrant for defendant's arrest. Defendant's mother admitted them and showed them to defendant's bedroom where defendant was lying on his bed, partially dressed, listening to the stereo. (J.A. 8-9, 18-19). At the officers' request, he dressed and went into the living room. Officer McAllister stepped into the nearby kitchen with defendant's mother to explain the situation, while Officer Burke stayed in the living room with defendant. (J.A. 9, 19).

Both officers considered defendant to be under arrest at this point, although defendant was not told he was under arrest. (J.A. 10, 27). Officer Burke stayed with defendant in the living room, and defendant sat down on the sofa. Burke sat down with defendant and asked him if he knew why the officers were there. Defendant said he did not. The officer inquired whether defendant knew Mr. Gross or the Gross family. Defendant said he did. Defendant also said that he had heard there had been a "robbery" at the Gross house. Burke replied that he thought defendant was involved in the burglary, and asked defendant what he knew about it. Defendant responded, "I was there." (J.A. 18-20, 28-29). Burke did

not ask any further questions of defendant at that time, nor did he otherwise attempt to clarify the nature or extent of defendant's participation in the crime, if any.

Defendant was placed in the patrol car, and one of the officers explained bail procedures to defendant's mother. Defendant's father arrived home at that time. After talking to the police, he became agitated with his son, went to the patrol car, and began to reprimand defendant. Officer Burke intervened and asked defendant's father to move away from the car. (J.A. 20-21).

The officers did not question defendant about the burglary during the ride to the police station. (J.A. 10-11; 23). They were required to respond to a possible crime, and a third officer who met them at the scene transported defendant to the police station. (J.A. 32-33). The two arresting officers joined defendant at the police station approximately 45 to 60 minutes later. They and defendant then went to Officer McAllister's office. (J.A. 11, 33). McAllister advised defendant of his rights by reading from a standard *Miranda* rights card. (J.A. 11; Ex. 6 rec'd at J.A. 13). McAllister asked defendant if he understood the rights, and defendant answered affirmatively. (J.A. 21). It appeared to Officer McAllister that defendant in fact understood his rights. (J.A. 13). Both McAllister and defendant signed the *Miranda* rights card. (J.A. 11-12; 21).

Defendant indicated he was willing to talk to the officers, and he gave a statement describing what

occurred on December 11, the date of the burglary. Officer McAllister typed the statement as defendant gave it orally. The statement was taken at 4:45 p.m. (J.A. 11, 22). After McAllister typed the statement, defendant reviewed it. McAllister also read it back to defendant. (J.A. 15). Inaccuracies, such as typographical errors and misspellings, were corrected and initialed by defendant, and defendant signed the two-page statement. (J.A. 15, 22). In it, defendant described who was involved in the burglary, what information he gave others about the premises, what he was paid for information about the residence and who paid him, and the extent of his involvement in aiding the entry. (Ex. 5 rec'd at J.A. 39). No threats or promises were made to defendant either at defendant's residence or at the police station when defendant gave his statement. (J.A. 13-15, 23).

B. Rulings Below: The Admissibility of Defendant's Post-*Miranda* Warning Confession.

Defendant was charged with first degree burglary in the Circuit Court for Polk County, Oregon. (Or. Rev. Stat. § 164.225). At trial, he moved to suppress his oral and written statements to police. Defendant's written motion to suppress urged that his initial statement ("I was there") was inadmissible because he had not been given the warnings prescribed in *Miranda v. Arizona*, 384 U.S.

436 (1966). (J.A. 4-5).[1] The state from the outset conceded the inadmissibility of the pre-warning statement and advised the court that it did not intend to offer the statement into evidence. (J.A. 39).[2] The state, however, offered defendant's written confession. Defendant objected to its admission because his initial oral statement to police, which was inadmissible under *Miranda v. Arizona*, *supra*, let the "cat out of the bag" and the subsequent written confession therefore was a "tainted" product of the initial *Miranda* violation. (J.A. 5, 16, 35-36). Defendant did not testify or otherwise present any evidence to establish a factual nexus between the pre-warning admission and the post-warning confession. The trial court denied the defendant's motion to suppress:

> "THE COURT: I'm going to deny the motion to suppress Exhibit #5 for these reasons: I'm of the view that the statements made by the defendant at the house in response to the officer's question:

---

[1] Although defendant's written motion also relied on state constitutional grounds, he treated the federal and state grounds as parallel and equal in their scope. Exclusively federal grounds were advanced by defendant on appeal. Both the trial court and the lower appellate court resolved the issue on federal grounds only. The manner in which the federal issue was raised and preserved are outlined in detail in the petition for writ of certiorari, pp. 5-8.

[2] The prosecutor's concession likely was traceable to the holding of *Orozco v. Texas*, 394 U.S. 324 (1969). We are not inclined to agree that the setting and atmosphere had inherent within them the potential for coercion to which the *Miranda* decision was directed, and thus we do not agree that defendant was "in custody" within the spirit and meaning of *Miranda*. However, the prosecutor's concession and the *Orozco* decision largely foreclose examination of these points in this case.

'What do you know about the robbery?' must be suppressed. It would not be admissible because this man was not advised of his Miranda warnings, his Constitutional rights.

"However, the statement taken at the jail would be admissible because the evidence shows that there was no taint between the first statement 'I was there' and the second. I have not seen the contents of the second statement, but assuming that there is incrimination [sic] evidence, statements in that written document, that would be admissible.

"There was a break in the events from 45 to 50 minutes away from the courthouse and being transported by the police officer, and I think the taint — there's no showing of any taint whatsoever.

"There is a showing by the State that the statements were made freely and voluntarily. The rights card is in evidence. The officer read the rights to him. They are numbered one through seven. They appear on Exhibit #6, and on the reverse side is the question: 'Do you understand these rights?' And the word y-e-h appears after that, which I assume is yes. 'Do you have any questions about your rights?' Answer: 'No.' 'Having these rights in mind, do you wish to talk to us now?' And it says, 'Y-e-h, I do.'

"And I find that the State has established that the statement was given freely and voluntarily and knowingly and will not suppress Exhibit #5."

(J.A. 37-39).

Following his conviction, on appeal to the Oregon Court of Appeals, defendant relied on *Wong Sun v. United States*, 371 U.S. 471 (1963), *United States v. Bayer*, 331 U.S. 532 (1947) and state cases applying the federal "fruit of the poisonous tree" doctrine, to maintain

that his written confession was a tainted product of his pre-warning statement, and that the trial court's admission of the confession was error. The court of appeals agreed. It held that the giving of *Miranda* warnings, and defendant's valid waiver of rights were inadequate, as a matter of law, to attenuate the taint of the initial *Miranda* violation. The Oregon Supreme Court declined review of the court of appeals' decision. The state filed a petition for writ of certiorari in this Court seeking clarification as to whether and when a violation of the procedural rules of *Miranda v. Arizona*, *supra*, requires exclusion not only of statements made without the required warnings, but also of a subsequent confession obtained after full warnings and a valid waiver.

SUMMARY OF ARGUMENT

The issue for resolution in this case is when, if at all, a lawfully obtained confession made after full compliance with *Miranda* procedures must be suppressed as a "tainted" product of a prior *Miranda* violation. The issue has not been squarely addressed or decided in the prior decisions of this Court. In the "consecutive confession" context, this Court has considered only the admissibility of confessions which follow prior involuntary confessions. Here, however, the initial statement made by the defendant was fully voluntary; the only obstacle to its admissibility at trial was the failure of police to give *Miranda* warnings.

When a confession is challenged by an accused to be the product of a prior illegally obtained statement, the threshold inquiry properly is that of voluntariness. The test articulated in *United States v. Bayer*, 331 U.S. 352 (1947), is appropriate to determine the extent to which police conduct in obtaining an admission or confession directly infringes upon an accused's Fifth Amendment privilege against compulsory self-incrimination. That test focuses on whether the effect of the coercive circumstances that rendered a first statement inadmissible carried over to invalidate a subsequent confession as well. The fact that the first statement lets the "cat out of the bag" is not sufficient in and of itself to render a later confession inadmissible if the unlawful circumstances that invalidated the first confession have been fully removed.

Under this analysis, if an initial statement is inadmissible exclusively because police failed to follow *Miranda* procedures and not because the circumstances of the initial questioning suggest actual coercion, the careful giving of *Miranda* warnings before further questioning necessarily removes the prior illegality. The procedural defect is fully cured. It follows that, under a pure Fifth Amendment analysis, there is no constitutional justification for suppressing the voluntary post-warning confession.

A voluntariness inquiry alone, while an important prong of the analysis, does not fully address the special

concerns present when a first statement is obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The procedural requirements announced in the *Miranda* decision are safeguards intended to protect the Fifth Amendment privilege by counteracting compulsion inherent in custodial interrogation. Exclusion of a statement made without the prescribed procedures is the remedy fashioned to ensure future compliance with the *Miranda* warning requirement. Given the deterrence rationale of the *Miranda* decision, the exclusionary principle underlying the "fruit of the poisonous tree" doctrine properly may extend to derivative evidence of an initial *Miranda* violation. However, any such extension must be carefully tailored to the prophylactic objective. To ensure that the goal of deterrence is meaningfully advanced by exclusion, a causal link between the initial illegality and the subsequent evidence must be shown. But the mere fact that illegal police activity plays some part in the circumstances leading to later evidence does not suffice for suppression. In the final analysis, the cost of exclusion must be weighed against the constitutional principles affected. Because a *Miranda* violation involves only an infringement of the prophylactic standards designed to safeguard the Fifth Amendment privilege against self-incrimination rather than an abridgment of the privilege itself, the high cost of exclusion should be paid only where the extreme circumstances of a particular case require sup-

pression as a deterrent to further resort to such unlawful conduct. In the context of sequential confessions, this objective is met best by restricting suppression to cases of intentional exploitation of the prior illegality.

Only through conjecture and speculative inference does the present case demonstrate a causal nexus between the initial illegality and the subsequent confession. Defendant's initial admission did not "seal his fate" or place him at any significant psychological disadvantage, for it was too limited in its content. The record simply is bereft of any affirmative factual support for the conclusion that the existence of defendant's first statement caused him to give his later confession. Nevertheless, even if the "cat out of the bag" inference is sufficient here to establish the factual predicate of a poisoned-fruit analysis, suppression is unwarranted. The cost of excluding a reliable, voluntary confession in this case far exceeds any dubious deterrent value. There is no evidence of a willful or purposeful attempt to circumvent constitutional requirements in obtaining the confession. Application of the exclusionary rule under these circumstances would further Fifth Amendment rights only minimally, if at all, while severely limiting the authority of police officers to question suspects and to investigate criminal activity.

In sum, there is no constitutional justification for a *per se* rule that a statement made in custody by a person fully informed of his constitutional rights is inadmissible

if at some earlier time he made inculpatory remarks without the benefit of *Miranda* warnings. Voluntary statements made prior to advice of *Miranda* rights do not render subsequent voluntary statements after *Miranda* warnings inadmissible unless the subsequent statements are the product of intentional exploitation of the prior illegality by police. Because the subsequent statements in the present case were not the result of intentional exploitation of the prior statement, defendant's confession is admissible, and the decision of the Oregon Court of Appeals should be reversed.

ARGUMENT

The issue presented is when, if at all, a voluntary confession made after full advisal and waiver of constitutional rights is inadmissible as a tainted product of a statement made earlier to police without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Thus presented, the issue is part of the broader question of the extent to which the prophylactic exclusionary principle of *Miranda* extends to derivative evidence, or "fruits," of a *Miranda* procedural violation.

In this case, defendant's initial limited admission that he was at the scene of the burglary was rendered inadmissible solely because the police had not given him *Miranda* warnings when the statement was made. Defendant made no claim below that his statement was involuntary or coerced, nor would the record support such an assertion. The police contacted the defendant in the

middle of the day in the familiar surroundings of his parents' home, with his mother nearby or present at all times. Although defendant was technically under arrest, he had not been confronted with this fact. His statement was in response to one or two questions or comments by the officer, made apparently as the officer attempted to explain why the police were there. Defendant was not subjected to lengthy questioning, nor did the officer pressure him to reveal details about the nature and extent of his involvement, if any, in the crime under investigation.

After defendant was driven to the police station, the police asked him if he was willing to give a statement. First, however, the officers fully advised defendant of his constitutional rights, including his right to remain silent, to have counsel present, and to have counsel appointed for him. Defendant intelligently and voluntarily chose to waive those rights, and he gave a detailed, two-page written statement outlining his involvement in the burglary. There is no suggestion in the record that defendant experienced or expressed any hesitation, uncertainty or unwillingness to talk to police either in making his initial admission or in deciding to give the written confession.

The Oregon Court of Appeals reached a constitutionally and logically untenable result in holding that defendant's written confession must be suppressed as a tainted product of the earlier failure to give *Miranda* warnings. The decision is analytically flawed. The lower

appellate court's erroneous course is charted, in large part, by a misreading and misapplication of the "cat out of the bag" reasoning of *United States v. Bayer*, 331 U.S. 532 (1947). The fact that an accused's resistance to remaining silent is lowered by the existence of a prior admission or confession was never intended, under the holding of *Bayer*, to be the test of whether a subsequent confession is inadmissible by virtue of a prior procedural illegality in obtaining the first statement. Nevertheless, the lower appellate court has elevated the "cat out of the bag" reasoning to the status of a *per se* rule of exclusion. The court's error is compounded by its unwillingness to distinguish between initial confessions that are involuntary in fact, and those that are inadmissible due to the failure of police to follow *Miranda* procedures.

If a voluntary confession given after full compliance with *Miranda* procedures is ever to be suppressed as a result of a prior *Miranda* violation, the basis for doing so must be found in constitutional principles of exclusion applicable to derivative evidence generally. The inquiry must focus on the extent of actual causation between the initial, illegally obtained admission and the later voluntary and lawfully acquired confession. Included in this analysis should be a principled assessment, made in light of the constitutional objectives of the *Miranda* decision, of the degree of attenuation brought about by subsequent full compliance with *Miranda* procedures. Further, the focus also should be on whether the police exploited the

initial illegality and whether the exclusion of derivative evidence will serve the policy of deterrence.

None of these inquiries is made or resolved in the Oregon Court of Appeals decision. Because they are not, the Oregon court reaches a wrong result which has the serious consequence of excluding reliable, lawfully acquired evidence without serving any constitutional objective. The issue presented by this case has never been squarely addressed in this Court. Its resolution provides this Court with an important opportunity to correct the decision of the Oregon Court of Appeals, and to give guidance to other courts.

I

In applying the test of admissibility announced in *United States v. Bayer*, initial confessions given under circumstances partaking of actual coercion must be distinguished from those which are inadmissible only because they involve *Miranda* violations. When this distinction is made, the conclusion necessarily follows that the giving of *Miranda* warnings removes the prior illegality and the subsequent confession is admissible.

The colorful "cat out of the bag" metaphor introduced into lawyers' vocabulary by Justice Jackson in *United States v. Bayer*, *supra*, is intended to describe the psychological disadvantage that an accused experiences when, after having previously been induced to confess, he

must decide whether to give a second confession. The metaphor suggests that an accused has less incentive to remain silent after he once has talked to police. The Oregon Court of Appeals' decision demonstrates the dangers inherent in reasoning by figure of speech. Legal metaphors are valuable tools to clarify, illustrate and persuade, so long as they are not permitted to become substitutes for analysis. Here, the metaphor was permitted to *be* the analysis. The court of appeals suppressed defendant's second confession solely on the basis that, at the time defendant gave his full confession to police, the "cat was out of the bag." This fact, the court of appeals concluded, was sufficient in and of itself to "taint" the second confession and render it inadmissible. A careful examination of the facts and the holding in *Bayer* reveals how fundamentally the court of appeals misapplied the "cat out of the bag" reasoning.

The defendant in *United States v. Bayer*, a soldier, was arrested, confined in a military psychopathic ward and denied, for an extended time, "callers, communication, comfort, and facilities" not detailed in the opinion. *Id.*, 331 U.S. at 539. He also was not charged or arraigned before a magistrate as required by federal law. Defendant gave a first confession after approximately one month of restraint under these circumstances. This confession was neither offered nor received at trial. Some six months after the first confession, defendant was questioned by FBI agents, who first advised him of his right to be silent.

Defendant was given his first confession to read. He then gave a second confession, labelled "supplementary," which was the same as the first, but more detailed. The lower federal court held that the second confession was "patently the fruit of the earlier one" and equally inadmissible, citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) and *Nardone v. United States*, 308 U.S. 338 (1939).

This Court reversed, holding that the "fruit of the poisonous tree" doctrine should not be applied to confessions. The opinion acknowledged that a causal nexus may exist between an induced initial confession and a subsequent confession by virtue of the psychological consequence of having once confessed. But the *Bayer* court disavowed that this causal link without more should render a subsequent confession unlawful:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first. *But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.* The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question."

United States v. Bayer, 331 U.S. at 540-541 (emphasis added).

The Court observed that when the accused gave his second confession, he was not under significant restraint and he had been fairly warned that his statement could be used against him. Citing *Lyons v. Oklahoma*, 322 U.S. 596 (1944), the Court held the second confession to be voluntary and therefore admissible. *United States v. Bayer*, 331 U.S. at 541.

The *Bayer* decision thus rejects, expressly, the "fruit of the poisonous tree" analysis in deciding the admissibility of confessions made after a previous involuntary confession. In doing so, the Court focuses on the distinction between confessions and inanimate derivative evidence, such as that at issue in *Silverthorne* and *Nardone*. As observed in the analogous area of statements or testimony given by third person witnesses:

> "The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. . . . [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence."

United States v. Ceccolini, 435 U.S. 268, 277 (1978) *quoting Smith v. United States*, 117 U.S. App. D.C. 1, 3-4, 324

F.2d 879, 881-882 (1963) (Burger, J.) *cert denied*, 377 U.S. 954 (1964).

The concern under the Fifth Amendment, always and only, is that an accused should not be forced to speak against his will. "Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself." *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) (emphasis original). A confession that is genuinely volitional, given because the accused chooses to give it, simply is not offensive to the Fifth Amendment. Thus, in the "consecutive confession" situation involving a prior involuntary confession, the Fifth Amendment interest to be protected is satisfied if the subsequent confession is shown to be voluntary. If the requisite showing is made, there is no constitutional justification for suppression of the confession.

The *Bayer* decision expressly rejects the notion that a voluntary confession should ever be suppressed solely on the basis that there a causal link between it and a prior involuntary confession. The presumed psychological and practical disadvantage caused by having previously confessed is not, in and of itself, an adequate basis to suppress a subsequent confession. The test is voluntariness. For a subsequent confession to be inadmissible, it too must be involuntarily elicited under coercive circumstances. The second confession thus must also be a poisoned tree. The

Bayer decision, in announcing this test, merely reaffirms what was held in *Lyons v. Oklahoma*, *supra*, where the Court recognized that the on-going effect of coercive practices may cause a non-conte_nporaneous confession to be involuntary as well.

> "Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. *Lisenba v. California*, 314 U.S. 219, 240."

Id. 322 U.S. at 602.

The *Bayer* analysis, applied to the circumstances here, provides no basis to suppress a *voluntary* confession given after police have fully complied with *Miranda* procedures. Where, as here, the only illegal condition rendering the first confession inadmissible is the lack of *Miranda* procedural safeguards, the illegality necessarily is removed when adequate *Miranda* warnings are given and the person questioned makes a valid waiver. No inference that a "coercive" practice has carried over to the non-contemporaneous statement fairly can be made. To conclude otherwise would be, in the words of the *Bayer* Court, perpetually to disable the accused from making an admissible confession. Nothing in the constitution or in the conscience of a civilized society compels that result.

The majority below attempted to disavow its *per se* rule of inadmissibility by declaring that a subsequent confession may be admissible if there is a "sufficient break in the stream of events" to insulate the later statement from the effect of what went before. In making this determination, the court of appeals identified lapse of time and change of circumstances as the most important considerations. (*See* Petition for Certiorari, App-3 - App-4).

Although the court of appeals' analysis is marked by several wrong turns, this is its single greatest deviation from the correct course. The suggestion that "lapse of time" and "change of circumstance" can remove the effect of the earlier *Miranda* violation is a *non sequitur*. Under *Bayer*, the focus is on the conditions that rendered the first confession unlawful and whether they carry over to render the second confession inadmissible as well. In the case of involuntary confessions, the concern is with revitalizing an accused's capacity for self-determination. Passage of time, change of surroundings and removal of an aggressive officer all logically bear on the suspect's ability to rest, reflect, reevaluate and otherwise restore his ability to exercise his will in choosing whether to speak. *See e.g., Clewis v. Texas*, 386 U.S. 707 (1967);

Westover v. United States, 384 U.S. 436 (1966).[3] But in the case of a failure to give *Miranda* warnings, it defies common sense to suggest that longer restraint, a change in location, or a change in questioning officers does anything to remove the initial illegality. Only an adequate advisal of the accused's constitutional rights, coupled with a valid waiver of those rights, will achieve this end. It is therefore crucial in applying the *Bayer* test of admissiblity that a distinction be made between confessions which are involuntary and those which are inadmissible only because *Miranda* procedures are not followed. The lower Oregon court's flat refusal to make that distinction is patently wrong.

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[3] *Westover v. United States*, 384 U.S. 436 (1966), one of the four cases decided in *Miranda v. Arizona*, demonstrates our point. Defendant's confession came after prolonged custody and intensive incommunicado interrogation initiated by state police. Some 14 hours after his arrest and after frequent interrogation by state police, defendant Westover was turned over to FBI agents for more questioning. Although the FBI advised defendant of his constitutional rights before he gave his confession, there was no articulated waiver of those rights. The *Miranda* court ruled that the waiver was invalid, although a different case might have been presented if defendant, when FBI took custody, were

> "removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same *compelling* surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the *pressure* applied by the local in-custody interrogation."

Id., 384 U.S. at 496-497. (Emphasis supplied).

There was no earlier confession in *Westover*, and thus no "cat out of the bag" effect to overcome by lapse of time or change of circumstance. Those considerations by the *Miranda* court, which are not ordinarily required as a precondition for a valid waiver, were suggested to be necessary to overcome the compulsion and pressure present in the *Westover* facts, not to somehow cure an earlier failure to give warnings.

Focusing on lapse of time and change of circumstances is equally illogical if, as the lower court holds, the objective is to dissipate the psychological effect of having made the prior confession rather than to dissipate the effect of the prior illegality. The decision in *United States v. Bayer*, as already demonstrated, of course does not establish this as the objective. To whatever extent a suspect in fact feels at a disadvantage by having previously confessed, he is never thereafter free of that feeling, as the *Bayer* opinion observes. That the "cat is out of the bag" is a given in the analysis. Nevertheless, the attenuating circumstances to which the court of appeals would look do nothing to counter whatever disadvantage a suspect senses. Moving the suspect to a new place for questioning, delaying further questioning for several days, and having a different officer ask the questions will not lessen the "cat out of the bag" impact of the prior statement. The suspect remains aware that he made the prior statement. If, as the court of appeals holds, *Miranda* warnings and a valid waiver are not sufficient to remove the prior illegality, then in fact the accused has been disabled forever from making a lawful confession. Thus, Judge Gillette, writing to concur in the result of the majority below, correctly observes that with the rule announced by the Oregon court, an accused who responds to pre-arrest (and we would add pre-warning) questioning is immunized from effectively waiving his

right to remain silent and voluntarily giving a statement to police. (*See* Petition for Certiorari, App-6).

In cases involving initial confessions inadmissible under *Miranda*, several lower federal court decisions have identified the proper analysis under *United States v. Bayer*, and the correct result. The test of admissibility for a subsequent confession is voluntariness. That a prior inadmissible confession lets the "cat out of the bag" is but one factor bearing on the disputed voluntariness issue. *Tanner v. Vincent*, 541 F.2d 932, 937 (2d Cir. 1976). This determination is primarily the responsibility of the trial court, whose decision on the basis of disputed facts is upheld unless clearly erroneous. *United States v. Schmidt*, 573 F.2d 1057, 1062 (9th Cir. 1978). *United States v. Toral*, 536 F.2d 893 (9th Cir. 1976) is on point:

> "[T]he proper inquiry is whether the conditions that rendered the pre-warning admissions inadmissible carried over to invalidate appellant's subsequent confession. . . . In the present case appellant's initial statements were rendered involuntary almost exclusively because of the failure of the police to give him the *Miranda* warnings. There was very little that was inherently coercive about the circumstances leading up to the admissions made by appellant either before or after the warnings were given. All of the questioning took place in the security of appellant's own home, . . . and the initial questioning, though improper, was in the form of preliminary questions that may have been asked of anyone in order to narrow the field of suspects. Unlike [the cases cited by appellant], the record before us

reveals no coercive atmosphere that was carried over after the *Miranda* warnings were given.

> "We do not suggest that the impact of the confession itself should be minimized. Under other circumstances, a prior *involuntary* confession standing alone may be enough to render involuntary a confession made after the *Miranda* warnings are given. In the circumstances of the present case, however, we cannot say that the impact of the prior statements was so great as to render appellant's confession involuntary."

536 F.2d at 896-897. (Citations omitted; emphasis added). To the same effect, *see Tanner v. Vincent*, *supra*; *United States v. Knight*, 395 F.2d 971, 973 (2d Cir. 1968); *Knott v. Howard*, 511 F.2d 1060, 1061 (1st Cir. 1975); *United States v. Shea*, 436 F.2d 740 (9th Cir. 1970); *United States v. Bowler*, 561 F.2d 1323 (9th Cir. 1977).[4]

Where an initial confession is excluded solely as a result of the failure to give *Miranda* warnings, the subsequent advisal of *Miranda* warnings and valid waiver of rights effectively remove the prior illegality. This result

[4] An appropriate case for contrast is *Evans v. United States*, 375 F.2d 355 (8th Cir. 1967). There, the defendant was detained in jail continuously for a period of two weeks and three days and, absent any warnings of his rights, was subjected to at least three interrogations by local officials. Although he repeatedly denied involvement in the crime under investigation, he finally confessed. He was a prisoner two weeks and six days before he was adequately advised of his rights by postal inspectors, who initiated more questioning and obtained a second confession. Defendant's first confession had fully revealed his involvement in the robbery and the officer to whom he gave the first confession was present at the time that postal inspectors resumed the questioning. The Eighth Circuit realistically appraised the total circumstances, and concluded that, like in *Westover*, federal authorities were the beneficiaries of pressure applied during the local, in-custody interrogation. The fact that defendant had *fully* revealed his involvement in the crime coupled with the circumstances of the initial interrogation, from which defendant had not effectively been removed, led to suppression of the second confession. 375 F.2d at 360-361.

should follow as a matter of law. The *Miranda* decision announces an objective test. The coercion which is deemed inherent in the objective circumstances of custody and questioning is further deemed adequately overcome when *Miranda* procedural safeguards are followed. For the limited purpose of requiring a warning procedure as a means of effectuating the Fifth Amendment, the *Miranda* decision presumes coercion whether or not, in a given case, coercion in fact exists. Just as the law is willing to make that presumption, the law must be willing to abandon it when the required procedures are followed. Although the privilege against self-incrimination has always been "as broad as the mischief" against which it seeks to guard, *see Councilman v. Hitchcock*, 142 U.S. 547, 562 (1892),[5] it should not be broadened beyond that mischief. That is, however, the consequence of the decision of the Oregon Court of Appeals which, on the basis of the initial *Miranda* violation, creates a rule of exclusion that extends far beyond the *Miranda* decision and its rationale.

II

There are sound justifications, provided by doctrinal developments since *United States v. Bayer*, to extend the "fruit of the poisonous tree" analysis to confessions that follow statements which are inadmissible under *Miranda*. Through a principled application of the derivative evidence

[5] Quoted with approval in *Miranda v. Arizona*, 384 U.S. at 459-460.

doctrine, however, the conclusion should be that *Miranda* warnings and a valid waiver adequately attenuate the initial illegality unless the extreme circumstances of a particular case require suppression as a deterrent to future unlawful conduct.

To the extent that the concern in a consecutive confession situation is to ensure the voluntariness of the later confession, the *Bayer* analysis, as applied by lower federal courts in cases such as *United States v. Toral*, *supra*, is correct and appropriate. However, doctrinal developments after the *Bayer* decision justify examination of whether *Bayer*'s rejection of a "fruit of the poisonous tree" analysis should be applied to consecutive confession situations in which the initial illegality is a *Miranda* violation.

Miranda v. Arizona, *supra*, decided 19 years after *United States v. Bayer*, marked a significant change in Fifth Amendment analysis. Before *Miranda*, the admissibility of a confession depended only on whether it was voluntary and the product of a free will. This determination called for a subjective inquiry into an accused's state of mind, based essentially on an examination of the circumstances of interrogation, to determine whether the processes were so unfair or unreasonable as to render a confession involuntary. *See* discussion and cases cited in *Michigan v. Tucker*, 417 U.S. 433, 441 (1974). With the *Miranda* decision, the privilege against self-incrimination for the first time was seen as the *principal* protection

for a person under arrest facing police interrogation. *Id.*, 417 U.S. at 442. More significantly, the Fifth Amendment was read to require that prophylactic safeguards be employed to protect against violations of the privilege. The *Miranda* Court fashioned the now-familiar set of warnings together with the requirement that a person in custody, before being questioned by police, execute a knowing and intelligent waiver of constitutional rights as procedural safeguards to protect the Fifth Amendment privilege. Statements obtained, whether inculpatory or exculpatory, as a result of custodial interrogation conducted without the *Miranda*-announced procedures were declared to be inadmissible. *See generally Miranda v. Arizona*, *supra*. Thus, although the Fifth Amendment has always directly forbidden the use of compelled testimony, the *Miranda* decision marked the point at which the Fifth Amendment was recognized to encompass an exclusionary rule designed to deter potential violations of the privilege as well as to vindicate actual violations.

The "fruit of the poisonous tree" doctrine developed as a means of effectuating Fourth Amendment guarantees by excluding evidence obtained derivatively as well as that obtained directly from an illegal search or seizure. *See Silverthorne Lumber Co. v. United States*, *supra*, and *Nardone v. United States*, *supra*. Given the deterrence rationale of the *Miranda* decision, suppression based on a failure to follow *Miranda* procedural safeguards is, in

principle, akin to exclusion of derivative evidence based on Fourth Amendment violations: the objective is not to remedy a direct infringement to the constitutional protection, but rather to prevent future infringements.[6] There is, therefore, no reason why, in a proper case, the exclusionary principle underlying the "fruit of the poisonous tree" doctrine should not extend to derivative evidence of an underlying *Miranda* violation, and this Court previously has so held. *Michigan v. Tucker*, *supra*, 417 U.S. at 446-447. But to state that proposition is to begin the analysis, rather than to end it. The important question for decision in this case is, as in *Michigan v.*

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[6] The distinction between suppression based on a pure Fifth Amendment analysis and one based on a Fourth Amendment exclusionary rule approach has been described in this way:

> "Under the fourth amendment, the essence of the constitutional wrong lies in the initial invasion of person or property; the exclusionary rule, as originally conceived, was a means of deterring this invasion. It is for this reason that the attenuation limitation arose in the fourth amendment context. As the causal chain between a wrongful act by the police and subsequent evidence becomes more attenuated, it becomes less likely that an intent to secure the evidence motivated the police action or that its exclusion would deter similar action in the future.
>
> On the other hand, the gravamen of a constitutional wrong under the fifth amendment is the use of a defendant's coerced testimony against him in a criminal proceeding, not the mere act of compelling him to speak; the fifth amendment exclusionary rule is an essential element of the constitutional right, not just a means of enforcing the right."

The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 222 (1968) (footnotes omitted).

Because *United States v. Bayer* involved only a pure Fifth Amendment claim of illegality and not a claim based on a violation of *Miranda* procedures, an exclusionary rule analysis was properly rejected by the *Bayer* Court.

Tucker, *supra*, 417 U.S. at 445, how sweeping the judicially imposed consequences of an initial *Miranda* violation shall be.

As a foundation to exclusion based on a "fruit of the poisonous tree" rationale, defendant must establish that a causal link actually exists between the initial illegality and the subsequent confession. *See Nardone v. United States*, *supra*. Exclusion then depends on whether the challenged derivative evidence has been obtained through exploitation of the illegality, such that suppression is likely to have a future deterrent effect. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338 (1974). Prior decisions of this Court, in making the latter inquiry, have carefully focused on the constitutional interest infringed by the initial illegality, *see, e.g.*, *Brown v. Illinois*, 422 U.S. 590 (1975), the direct or indirect nature of the infringement, *Michigan v. Tucker*, *supra*, and the character of the fruit that is borne of the initial illegality, *see, e.g.*, *United States v. Ceccolini*, *supra*.

None of this Court's prior cases is directly on point. The Court has had before it cases involving post-warning confessions which were the product of initial violations rooted in the Fourth Amendment. *See, e.g.*, *Brown v. Illinois*, *supra*; *Dunaway v. New York*, 442 U.S. 200 (1979). It also has addressed application of the "fruit of the poisonous tree" doctrine in the context of derivative evidence consisting of the testimony of a third party

witness whom police would not have identified but for their use of information available due to a statement elicited in violation of *Miranda* procedures. *See, e.g., Michigan v. Tucker, supra.* This case is without precedent in this Court, however. It involves a novel combination of a "poisoned tree" that finds its roots in a statement inadmissible solely under *Miranda*, and a "fruit" consisting of a confession elicited after full compliance with *Miranda* procedures. As was the case when this Court decided *Michigan v. Tucker, supra*, the absence of precedent on point requires examination of the matter as a question of principle.

The foremost principle for guidance is that the exclusionary rule, whether applied to direct or derivative evidence obtained as a result of unconstitutional police conduct, is aimed at preventing future violations rather than punishing the police.

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

Elkins v. United States, 364 U.S. 206, 217 (1960). *Accord United States v. Calandra, supra*, 414 U.S. at 347.

The rationale of the "fruit of the poisonous tree" doctrine assumes the existence of a causal connection between the initial illegality and subsequently acquired evidence. But the mere fact that illegal police activity

forms some link in the chain of circumstances that leads to evidence is insufficient to justify exclusion.

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

Wong Sun v. United States, supra, 371 U.S. at 487-488.

This Court therefore has cautioned that although "sophisticated argument" may prove a causal connection, the connection may, as a matter of good sense, have become so attenuated as to dissipate the taint. *Nardone v. United States, supra*, 308 U.S. at 341. The issue cannot be decided on the basis of causation in the logical sense alone, or through the sort of analysis applicable in the physical sciences. *United States v. Ceccolini, supra*, 435 U.S. at 276. Rather, the cost of exclusion must be weighed against the constitutional principles to be protected, and application of the "fruit of the poisonous tree" doctrine must be restricted to those areas where the remedial objectives of the exclusionary rule are most efficaciously served. *United States v. Ceccolini, supra*, 435 U.S. at 275, 279; *United States v. Calandra, supra*, 414 U.S. at 348.

A. The record in this case does not establish a causal nexus between the initial illegality and the subsequent confession.

Even though simple "but for" causation is not an adequate basis for exclusion of derivative evidence, factual causation is nevertheless an essential predicate for invoking the exclusionary rule. The existence of the necessary causal link may, in some cases, be undisputed. *See, e.g., Michigan v. Tucker, supra*, 417 U.S. at 433 (government stipulation). Under certain facts, the causal link may be self-proving or reasonably beyond dispute. *See, e.g., Commonwealth v. White*, 374 Mass. 132, 371 N.E.2d 777 (1977) *affirmed without opinion by an equally divided court*, 439 U.S. 280 (1978) (information acquired from inadmissible confession used to obtain search warrant) and *Harrison v. United States*, 392 U.S. 219 (1968) (only reasonable inference was that defendant took stand and made testimonial admissions to rebut prosecution's use of the erroneously admitted confessions). In all other cases, if a defendant desires to suppress evidence as the "tainted" product of an earlier illegality, defendant must establish the factual nexus between the two. *See Nardone v. United States, supra*, 308 U.S. at 342; *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Fahy v. Connecticut*, 375 U.S. 85, 91 (1963).

The only basis for concluding in this case that there is any factual link between the initial *Miranda* violation and defendant's post-warning confession lies in the

inference that defendant gave the second confession because his first statement let the "cat out of the bag." That inference is, however, a particularly weak one under the facts presented.

First, given the contents of defendant's two statements, it simply is not logical to draw that inference. Defendant's initial admission ("I was there") merely placed him at the scene of the crime. In striking contrast to this limited admission, defendant's post-warning written confession, which was two pages in length, described in great detail how defendant participated in the burglary, whom he assisted, and what he was paid for his assistance. To suggest that defendant's limited initial statement "sealed his fate" and placed him at the psychological disadvantage of having told police all or even most of what there was to tell, strains both imagination and belief. Defendant, significantly, did not take the stand to so testify. But even if he had done so, the trial judge, relying on learning, good sense and common experience, would have been well justified to disbelieve him.

To draw an inference of a causal nexus based on the "cat out of the bag" reasoning of *United States v. Bayer, supra*, is unwarranted for a second reason. The logic of that reasoning is substantially diluted where, as here, an initial confession is inadmissible solely because of a *Miranda* procedural violation, not because it was given under circumstances suggesting elements of compulsion.

Judge Friendly recognized this in *United States v. Gorman*, 355 F.2d 151 (2d Cir. 1965), a case which preceded *Miranda v. Arizona*, *supra*, but which involved analogous facts. There, the defendant made a voluntary and limited statement that was inadmissible because of a failure to provide warnings mandated by federal statute. He was later properly advised of his rights, and he gave a full confession. In rejecting an argument that the second confession should be suppressed as a product of the first, Judge Friendly reasoned:

> "[T]he district judge was warranted in finding the detailed statement to Agent Wickman not to have been so causally related to the brief admission of guilt to Detective Cuomo as to vitiated by infirmity in the latter, if infirmity there was. Gorman's case is quite different from the situation in which, after a first confession has been extracted from a man previously professing innocence by means calculated to break his will, a second confession is more politely secured. In such a case, there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time, cf. United States v. Bayer, . . . Gorman's admission to Detective Cuomo was made spontaneously and without pressure, and its causal relation to his subsequent detailed confession is tenuous at best."

Id. at 157 (citations omitted).

The above reasoning applies equally here. As *Michigan v. Tucker*, *supra*, recognizes, a statement may be may voluntary under traditional standards even if it is inadmissible due to a failure of police to provide *Miranda* warnings. *Id.*, 417 U.S. at 444-446. Unlike a suspect who maintains innocence or lack of knowledge and who is forced against his will to confess, a person who speaks voluntarily does not have it in mind to keep the "cat in the bag." In that circumstance, a later confession given after adequate advice of the right to remain silent is at least as likely, if not more likely, to be motivated by a continued willingness to talk to police than to be a product of an inner sense of futility. The "cat out of the bag" reasoning of *United States v. Bayer*, when applied to cases involving voluntary confessions rendered unlawful only due to a *Miranda* violation, simply proves too much.[7]

B. The cost of excluding defendant's post-warning voluntary confession is not justified because exclusion would not meaningfully advance the interests protected by the Fifth Amendment.

If the "cat out of the bag" inference is considered adequate here to establish the necessary cause-in-fact

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[7] Although *United States v. Bayer*, preceded the *Miranda* decision and thus did not consider the force of its logic to instances where, as here, the first confession was given under circumstances totally lacking coercion or duress, we think it is of some significance that the *Bayer* court expressly directed its observations to confessions that are a product of inducement:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the *inducement*, he is never thereafter free of the psychological and practical disadvantages of having confessed."

331 U.S. at 540 (emphasis added).

predicate of a "fruit of the poisonous tree" analysis, the question remains whether suppression of defendant's confession adequately will advance the constitutional interest infringed. Courts that have wrestled with the problem in the related area of *Miranda* violations leading to the discovery of tangible evidence have expressed concern that the admission of such "fruits" would "in effect, sanction the initial violation of constitutional rights" and cause those violations to escape appellate review. *See, e.g., Commonwealth v. White, supra*, 371 N.E.2d at 781. *Accord, State v. Preston*, 411 A.2d 402, 407 (Me. 1980). Although that concern must be addressed, the focus nevertheless is not on penalizing past violations, but on preventing violations in the future. Thus, as observed by the Maine court in *State v. Preston, id.* at 407-408, because of the importance of the deterrence rationale, the prophylactic effect of exclusion on police practice is critical in deciding how far to extend the exclusionary rule to evidence obtained as a result of a *Miranda* violation.

The only constitutional interest at all implicated by the initial illegality here is defendant's Fifth Amendment privilege against self-incrimination. The analysis under *United States v. Bayer, supra*, with its focus on the voluntariness of a subsequent confession, is adequate to determine the extent to which that constitutional interest is directly infringed in any given instance. Realisically assessed, the facts of this case admit of no other conclusion than that defendant's initial statement was purely voluntary, a product of defendant's free choice rather than of inducement or coercion by police. The only illegality that infected his initial statement—*i.e.*, the lack of *Miranda* warnings and a valid waiver—was fully removed at the time of his subsequent confession. The time, place and manner of the police questioning surrounding his subsequent statement are adequate to demonstrate that his confession was knowingly, intelligently and voluntarily made, as the trial court expressly found. Under these facts, there simply is nothing directly offensive to the Fifth Amendment's concern that an accused not be compelled to incriminate himself.

This case thus involves an initial illegality like that in *Michigan v. Tucker, supra*. As this Court observed there, the failure of law enforcement officers to follow *Miranda* procedures does not directly infringe upon the Fifth Amendment protection against compulsory self-incrimination. Rather, such an omission violates only the prophylactic rules developed to protect the Fifth Amendment right. *Id.*, 417 U.S. at 439. Where circumstances surrounding a pre-warning admission or confession strongly indicate that an accused has not been deprived of his privilege against self-incrimination as such, but has only been denied procedural safeguards associated with that right, the constitutional interest to

be advanced by exclusion is substantially diluted. The real objective in applying a rule of exclusion to "fruits" of a *Miranda* violation is not to deter coercive police practices *per se*. It is, instead, to deter failures to follow *Miranda* procedures which, in turn, are designed to safeguard against coercion. A "fruit of the poisonous tree" analysis, when applied to *Miranda* violations, thus creates a second generation exclusionary rule. Because we are all the further away from applying the medicament to the evil it was designed to cure, that medicament should be all the more cautiously taken.[8]

Because the rationale of the exclusionary rule under the "fruit of the poisonous tree" doctrine is deterrence, this Court's prior decisions carefully have considered the existence of flagrancy or wilfullness in the illegality and other factors suggesting that police deliberately attempted to circumvent constitutional requirements. *See, e.g., Michigan v. Tucker, supra*, 417 U.S. at 447-448; *Brown v. Illinois, supra*, 422 U.S. at 402-404. Here, evidence of purposefulness or willfulness is wholly lacking. Officer Burke's failure to advise defendant of his rights at

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[8] We borrow from Professor Amsterdam's frequently quoted observation on the need to serve the deterrent purpose of the exclusionary rule in its application:

> "As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease."

Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

worst appears to have resulted from inadvertence. More likely, it was a consequence of the difficulties that law enforcement officers encounter as the *Miranda* doctrine encroaches ever further into law enforcement activities in the field. "Custody," as that term was used in *Miranda v. Arizona*, was designed to capture in concept the type of restraint that law enforcement officers exercise most typically after arrest and transportation of a suspect to a police station, where the suspect frequently is held incommunicado, "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." 435 U.S. at 456.

Here the officer's state of mind created a type of anticipatory custody, rather than custody in fact. In actuality, no restraint had yet been exercised over defendant; he remained in his home with family nearby, the setting was casual and relaxed. Lower courts continue to struggle over the question of what, for purposes of triggering *Miranda* procedural requirements, constitutes "custody" outside of police station interrogation of suspects under arrest. *See, e.g.*, Petition for Certiorari, *Oregon v. Roberti*, (No. 82-315), Brief for Petitioner, *Berkermer v. McCarty*, (No. 83-710). In an area where legal practitioners have considerable difficulty in articulating and agreeing on the legal standards, it should come as no surprise that law enforcement officers have frequent difficulty in applying them. But as stated in *Michigan v. Tucker, supra*:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic."

417 U.S. at 446.

In any event, whether the officer's error stemmed from the practical difficulties of applying the *Miranda* doctrine or from simple inadvertence, there is certainly nothing to suggest that the omission of warnings was purposeful. If the officer had intended to create a "cat out of the bag" effect by eliciting a confession from defendant before giving warnings, it can be reasonably expected that the officer would have pursued the matter further. At the very least, when defendant stated "I was there" the officer likely would have asked defendant who else was there, what was taken, and so on. Or, if the officer had intended to exploit defendant's earlier admission when he advised defendant of his *Miranda* rights and obtained a full confession from defendant, the officer likely would have confronted defendant with that admission at the police station, in an attempt to suggest, overtly or subtly, that having admitted his presence at the scene of the burglary, defendant might as well give the police a full account of his involvement in the crime. The police did neither of these things in this case.

Thus, the most striking feature of the Oregon Court of Appeals' decision is that an altogether voluntary confes-

sion, made after full compliance with *Miranda* procedures, is suppressed in a circumstance where there is nothing particularly offensive about the illegal police conduct, and where there is no evidence whatsoever that police exploited, used or took advantage of the prior illegality in any way.

All of this points to a concern that significantly distinguishes this case from those involving tangible or inanimate evidentiary fruits. A defendant's decision, after adequate advice of rights and a waiver of those rights, to speak under facts such as those presented here is a product of individual personality and motivation. The simple reality is that our ability accurately to predict human behavior is limited, and accordingly there are limits on the extent to which we should hold police accountable for the internal reactions of those whom they question. As already demonstrated, the "causal link" between the prior admission and the subsequent confession is at best speculative and tenuous. That link may in fact be only one of many in the chain of causation. Human conduct is individualized by personality, and it is fueled by a vast range of subjective choices and concerns. A suspect's decision to confess may stem from anxiety, remorse, a hope for lenient treatment, a lack of concern about consequences, or from any number of other reasons or combination of reasons. The greater likelihood is that in any given case, there is no single motivating factor such that it can be predicted with reliability that

removal of that factor would lead to a different decision on a suspect's part.

For many of these reasons, in the analogous area of testimony by third party witnesses who are discovered as a result of some prior illegality, this Court has held that the exclusionary rule should be invoked with much greater reluctance. Where the claim is based on a causal relationship between a constitutional violation and the statements made thereafter by a live human being, the causal predicate of the "fruit of the poisonous tree" doctrine admits of more uncertainty than when a similar claim is advanced to support suppression of an inanimate object. *See generally United States v. Ceccolini, supra.* Similar caution should be exercised here.

On the whole, the decisions of this Court reflect a policy that genuinely voluntary statements, so long as otherwise trustworthy and relevant, should not be suppressed unless strong countervailing policies exist. Under a "fruit of the poisonous tree" analysis, discussions of causation, attenuation, and "taint" sometimes distract from the more essential inquiry: will the interest protected by the Constitution be sufficiently advanced by exclusion to justify the serious cost of such a penalty? Here, it must be concluded that the cost of exclusion is too great. As previously demonstrated, the effect of holding defendant's post-warning confession inadmissible is to disable a suspect permanently from giving a usable confession once a *Miranda* violation has occurred, no matter how voluntarily and freely the confession is given.

Against that cost, which is an extremely high one, *see United States v. Ceccolini, supra,* 435 U.S. at 278-279, must be balanced the mere departure from the prophylactic standards of *Miranda* and the likelihood that, because of the complete absence of purposefulness or exploitation on the part of police, no deterrent purpose will be served. When these factors are placed on the scales, the balance swings decidedly in favor of admitting the challenged confession.

Because there is no abridgment of the Fifth Amendment privilege against compulsory self-incrimination in cases such as this, it may be that the balance will nearly always fall to the side of admitting a voluntary confession made after full compliance with *Miranda* procedures. Indeed, the suggestion of this Court in other cases has been that where the prior illegality does not implicate Fourth Amendment concerns or directly infringe on the privilege against compulsory self-incrimination, substantially less is needed to "attenuate the taint"; the giving of *Miranda* warnings will often be adequate for this purpose. *See Brown v. Illinois, supra,* 422 U.S. at 601-603; *Michigan v. Tucker, supra,* 417 U.S. at 448-450. We do not advocate a *per se* rule of admissibility, however, although such a rule might have considerable merit for its ease of application and its frequently correct result. *See United States v. Ceccolini, supra,* 435 U.S. 281-285 (Burger, C.J., concurring). It is at least conceivable that a case may arise where

the prior *Miranda* violation is flagrant and egregious, where police plainly exploit the prior illegality by taking an active hand in suggesting to defendant that the "cat is out of the bag," and where police unquestionably have attempted to circumvent the dictates of *Miranda v. Arizona*. If such a case ever arises, the courts should be prepared to address it and to deter such conduct in the future. This is not such a case.

In sum, this is not a case in which the police wilfully disregarded the requirements of *Miranda* or even attempted to capitalize upon the fact that defendant was not advised of his *Miranda* rights the moment he was taken into custody. It is not a case in which the police exploited defendant's voluntary admission, at the time he was arrested, that he had been present at the scene of the burglary, either by asking him to elaborate upon it then and there, or by reminding him of the admission later at the police station, after advising him of his *Miranda* rights. It is not even a case in which a causal connection has been demonstrated between defendant's admission that he "was there" at the burglary scene and his subsequent written confession detailing his involvement in the burglary. The *post hoc, ergo propter hoc* reasoning of the Oregon Court of Appeals to the contrary is fallacious.

CONCLUSION

Justice Oliver Wendell Holmes once wrote:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[9]

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[9] *Hyde v. United States*, 225 U.S. 347, 391 (1912) (dissenting opinion).

The lower Oregon appellate courts' fascination with the "cat out of the bag" metaphor is understandable, even if not excusable. But it results in an analysis that departs sharply from principle, and leads to a seriously wrong result. Whether the analysis is made under a pure Fifth Amendment approach such as that employed by *United States v. Bayer*, or whether, because this case involves a *Miranda* violation rather than a direct infringement of the Fifth Amendment, a "fruit of the poisonous tree" approach is taken, the challenged confession properly should be admitted. The Oregon Court of Appeals erred in concluding otherwise, and the judgment of the lower court should be reversed and remanded.

Respectfully submitted,

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